

Workers' Compensation Alternatives: Opting Out, Non- Subscription and Other Options

**Spencer Educational Foundation
Risk Manager in Residence Program
University of Houston
March 21, 2017**

WC and Options have the Same Primary Objective

Improving the lives of injured workers.



**Producing consistently good to great
outcomes**

Core Option Principles:

1. Better Communication
2. Fiduciary Decision Making
3. More Employee and Medical Provider Accountability
4. More Competition

THE OPTION

Delivering better medical outcomes to injured workers and giving employers a choice in how they will manage occupational injury benefits

- **Protects The Employee**
- **Same Or Better Benefits Than Workers' Compensation**
- **A Competitive Alternative**

WHY IT WORKS

AN ENHANCED PROCESS

- Immediate injury reporting
- Better medical management
 - Treatment by the best medical providers (WC and non-WC doctors)
 - Increased employee accountability to follow prescribed medical treatment plan
- Fewer benefit claim disputes
- Better communication between the employer and employee

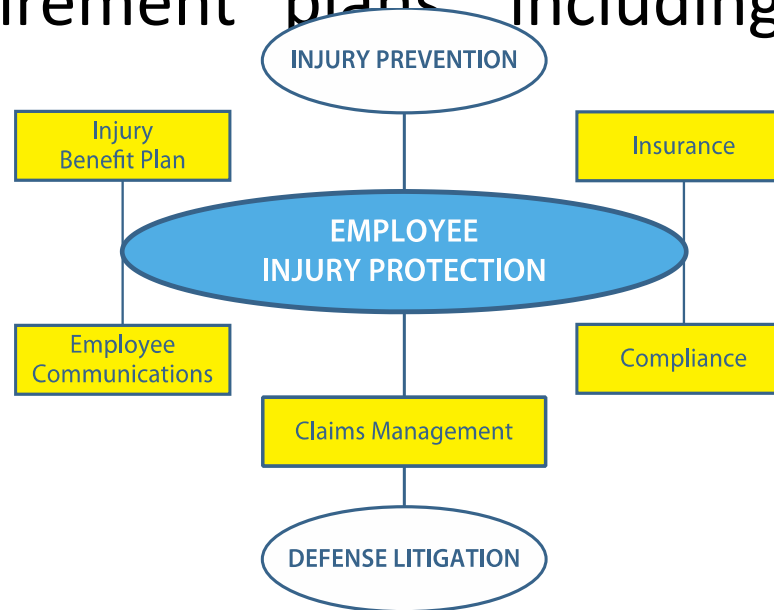
HOW IT WORKS

QUALIFICATION AND BETTER BENEFITS

- Employer obtains WC and Option insurance quotes from an agent
- Employer chooses the Option and designs Injury Benefit Plan
- Proposed plan and financial security are reviewed and approved by Dol
- All employees receive full communication of benefits, rights and responsibilities
- Injured employees receive expedited medical care, resulting in a faster recovery
- **Mandated benefit levels are higher than WC**
- Co-workers exposed to unsafe conditions for shorter period resulting
in safer workplace

COMPONENTS OF AN INJURY BENEFIT PROGRAM

- Full pre- and post-injury communication of employee rights
- Essentially the same claim and appeal process as group health and retirement plans including access to the courts



Employee Injury Coverage Models

Statutory WC: All workers are covered, subject to certain exemptions.

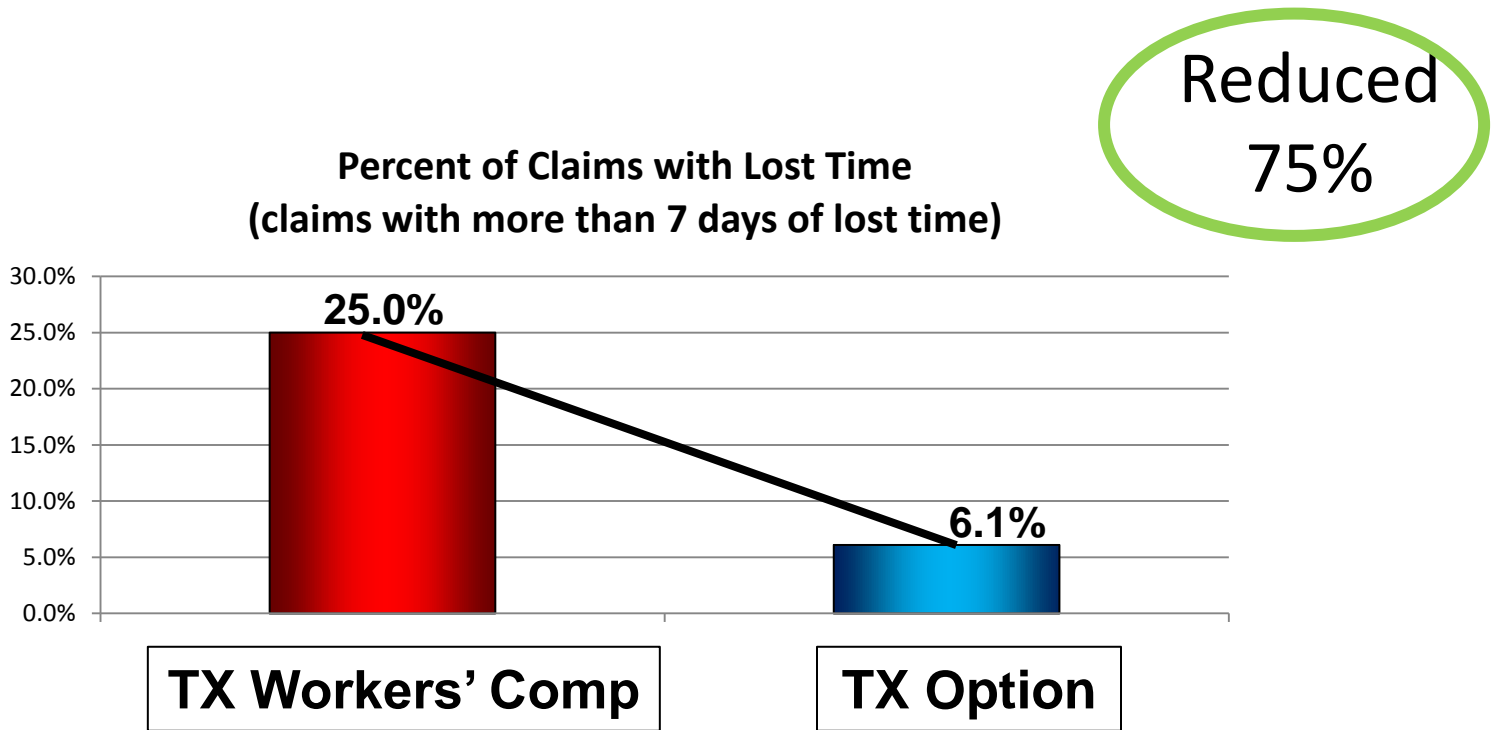
TX: *Three Alternatives*

1. Workers' Comp
2. Injury Benefit Plan (voluntary; no mandate)
3. Do Nothing (aka "Go Bare" or "Opt-Out")
 - *Not a Responsible Alternative to WC!*
 - *Not proposed in Other States.*

OK, TN, & SC: *Only Two Alternatives*

1. Workers' Comp
2. Injury Benefit Plan (an "Option")

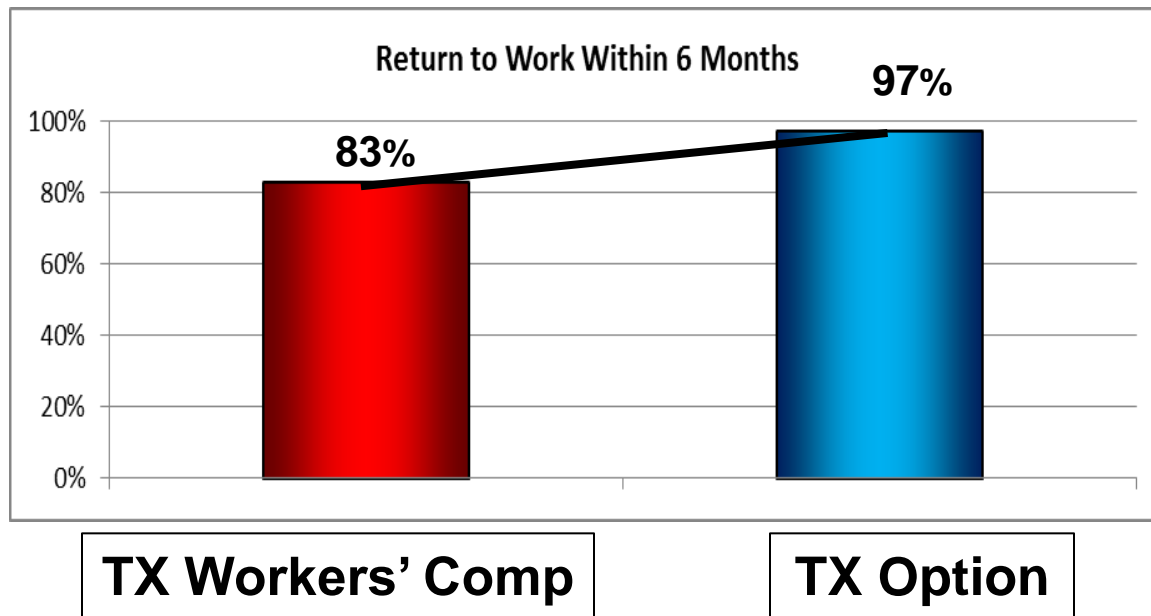
Fewer disabled employees



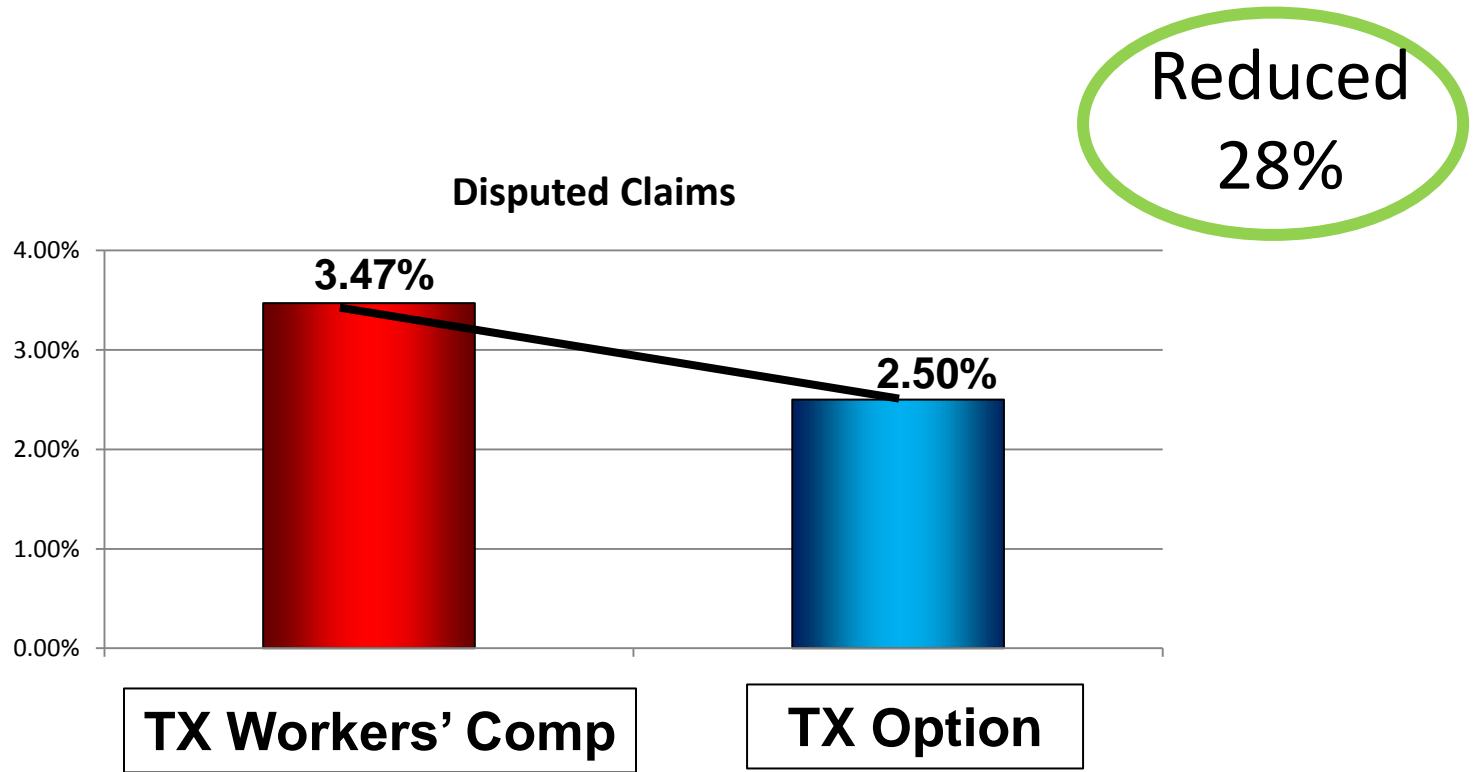
Source: "Options to Workers' Compensation: Positive Outcomes for Injured Workers and Employers", PartnerSource, January 2016

Faster return to work

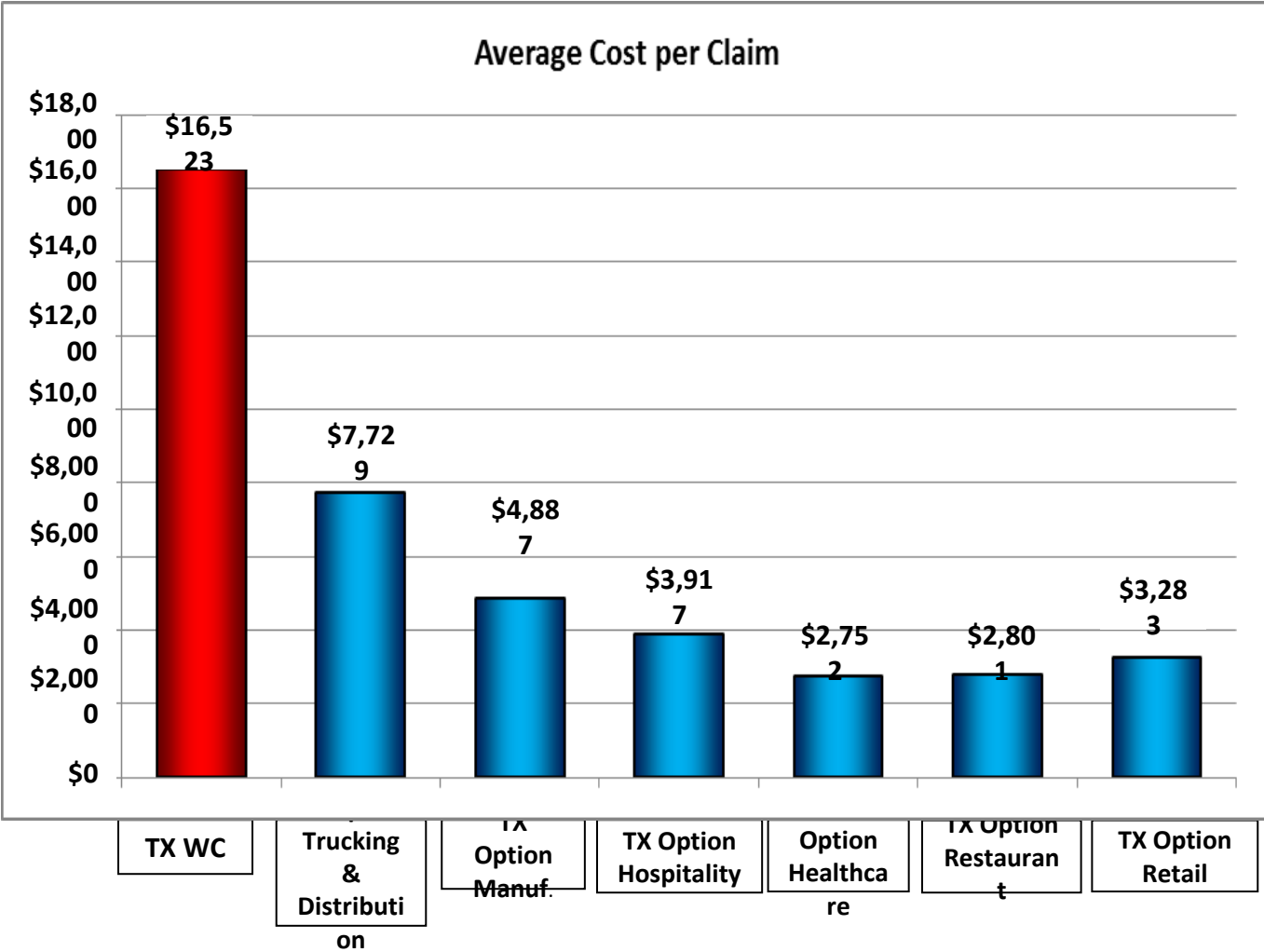
Increased
17%



Fewer Disputes



Lower Total Employer Cost



What would a responsible alternative to WC look like?

Any alternative workers compensation mechanism should:

- * Assure fair competition among all employers
- * Provide equal protection for all employees
 - Entitle injured workers to benefits that are at least equal to WC
 - Entitle injured workers to all reasonable and necessary medical
- * Include independent and impartial dispute resolution
- * Incentivize all employers to maintain safe workplaces
- * Require alternative plans to be approved by the state and available for public inspection
- * Include appropriate state data reporting requirements
- * Provide guarantees that benefits will be paid when due even if employer or plan becomes insolvent

Better Communication

Workers' Comp

No pre-injury communication; employer largely removed from claims process

Option

Full explanation (SPD), disability benefits on normal payroll system, and ability to review and settle

- Impact: Employee accountability and appreciation, improved service, and fewer disputes

Fiduciary Decision Making

Workers' Comp

No. Focus = cost containment

Option

Yes. Focus = best interest of employee (or risk personal liability)

- Impact: Less regulatory involvement, more efficient court process, and lower taxpayer expense

More Employee and Medical Provider Accountability

- Example: Accident Reporting

* subject to good cause exception

Workers' Compensation

Within 30+ days *

Option

Within 1 (or up to 3) days
*

- Impact: Faster care, timely investigation, valid drug/alcohol testing, and faster correction of unsafe condition for co-workers

More Employee and Medical Provider Accountability

- Example: First Medical Treatment

Workers' Compensation

Within 1 year *

Option

Within 30 days *

- Impact: Reducing delays in diagnosis and treatment leads to better medical outcomes

More Employee and Medical Provider Accountability

- Ex: Time limit between Medical Appointments

Workers' Compensation

1 year *

Option

90 days *

- Impact: More persistency of medical care

More Employee and Medical Provider Accountability

- Example: Choice of Medical Provider

Workers' Compensation

Employee picks from list of providers willing to accept workers' compensation claims

Option

Employee is directed to best provider (who may or may not accept workers' comp claims)

- Impact: Expanded provider access and employee not forced to guess or seek attorney input

More Employee and Medical Provider Accountability

- Example: Require comprehensive medical history/physical exam and review of current/past diagnostic tests/imaging

Workers' Compensation

No

Option

Yes

- Impact: Focus more on evidence-based medicine and less on employee self-reporting and physician speculation

More Employee and Medical Provider Accountability

- Example: Following Treatment Instructions

Workers' Compensation

Optional, with low standard to rebut physician opinion

Option

Mandatory, with more weight on physician opinion

- Impact: Follow physician's medical advice or benefits cease

BENEFITS TO THE STATE

- Decreases cost to the state and employers
- Key tool for economic development
- More dollars that can be used to invest in education, safety, transportation and other legislative priorities
- Safer places to work
- Higher injured worker satisfaction

OPTION FACTS

- The vast majority of Texas and Oklahoma employers that have elected the Option are **small, local businesses adopting turnkey programs supported by insurance companies**. Options to workers' compensation have also created competition that has reduced workers' compensation premiums for ALL businesses.
 - Texas has moved from **10th to 38th** most expensive workers' compensation state through a combination of reforms and a competitive Option.
- Since 2014, Oklahoma workers' compensation premiums have dropped **more than 15%** for most employers due to the same combination of reforms and a competitive Option.
 - Annual claim cost savings for employers moving from Texas and Oklahoma workers' compensation to Option plans routinely exceed **40%** – with higher wage replacement benefits and **more satisfied employees**.

TEXAS Non-subscription

- Alternative to Standard Workers' Comp Statutes
- Texas
 - Opt-In (Workers' Compensation)
 - Nonsubscriber
 - Bare
- Oklahoma
 - Workers' Compensation
 - Opt-Out
- Tennessee – Opt-Out Proposal
- South Carolina – Opt-Out Proposal

Advantages of Nonsubscriber Plans

- Improved workplace safety and training
- Medical care
 - Expanded access to quality medical providers
 - More expedient medical treatment and more immediate referral to specialized medical treatment
- Ability to customize plans for expanded benefits
- Opportunity for reduced waiting periods for wage replacement with greater benefits
- Better communication between employer and employee

Advantages of Nonsubscriber Plans

- Delivering better medical outcomes
- Higher satisfaction for injured employee
- Driving state economic development
- Reduced litigation
- Cost savings

Texas Employer Options

- 1) Workers' Compensation Insurance (Opt-In)
- 2) Nonsubscriber Plan
- 3) No Insurance (Bare)

In 2014, approximately 33 percent of businesses were nonsubscribers, up slightly from 32 percent in 2010, but down from 40 percent in 2004.

Texas Nonsubscriber Plan

- It is a voluntary benefit program and requires a written ERISA plan document.
- ERISA document establishes the terms and coverage of the Plan.
- Employees are provided a summary plan description which tells them
 - what to do if they are hurt on the job
 - about plan benefits, and tells them
 - how any disputes with their employer will be resolved
- Nonsubscription plans may be self-administered by a large employer, managed by the insurance carrier or by a third party administrator.

Texas

- Businesses must participate in the workers' comp system in order to contract with local, state, and federal governments.
- Governmental entities and those who work with them may not operate as nonsubscribers in Texas.

Texas – Reasons Employers Move From Workers' Comp to Nonsubscription

- Flexibility to customize your own plan
- Improved health care and medical management
- Reduction in number of claims
- Ability to settle claims
- Cost reduction
- Virtually no litigation

Texas - Advantages of Nonsubscriber Plans

- Allows employer to communicate more effectively with medical providers
- Able to obtain second medical opinions
- May suspend benefits if injured employee does not follow the requirements of the program

Texas Nonsubscriber

- Data demonstrates a significant reduction in costs for disability benefits and medical benefits on a per claim basis.
- Data shows improved overall outcomes for employees as they have access to better medical care.
- The convergence of improved outcomes with reduced cost is borne out by the data from the managed care programs utilized by many of the employers participating in these alternative plans.

Waffle House Experience in Texas

- Initial improvement the first year
 - Reduced frequency by 34%
 - Total paid down 78%
 - Reduced indemnity claim frequency by 86%
 - Indemnity costs down 99%
- After five years
 - Total paid down 81% or annual savings of \$787,420

Waffle House Experience in Texas

- 13 years later in 2015
 - Claims costs per unit down 93% or a savings of \$833,000 in FY15
 - # of claims per unit down 59%
 - Indemnity costs down 99%
 - Total paid down 78%
- Estimated overall savings from FY02-FY15 is \$9,700,000
- Since 2002, only four claims with attorney involvement
- Of these four claims, all settled reasonably prior to arbitration

Oklahoma

- In 2013, the state of Oklahoma enacted new workers' compensation legislation – Oklahoma Employee Injury Benefit Act – Feb. 2014.
- Allows any employer to exit, or “opt out” of, the state's statutory system and manage employee injury claims.
- Differs from "nonsubscription" in Texas.

Oklahoma Opt Out

- “Qualified Employer” in Oklahoma may “opt-out” from the Administrative Workers’ Compensation Act by establishing an Employee Benefit Plan governed by the provisions ERISA, which Plan must comply with the Oklahoma Employee Injury Benefit Act.
- Qualified Employer – “an employer otherwise subject to the Administrative Workers’ Compensation Act that voluntarily elects to be exempted from such Act by satisfying the requirements of this Act.” *Sec 201, Title 85A*

Plan Requirements

- Provide for payment of the same forms of benefits included in the Administrative Workers' Compensation Act for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent loss of use of scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, and with dollar percentage, and duration limits that are at least equal to or greater than the dollar, percentage and duration limits contained in Sections 45, 46 and 47 of this title.

Section 203 (B)

Benefit Plans

- For this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act; but no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated. *85A O.S. Supp. 2015, Sec 203(B)*

Oklahoma Workers' Compensation Commission Order – February 26, 2016

- *Jonnie Yvonne Vasquez v. Dillard's, Inc.*
- Dillard's "Employee Benefit Plan" is an ERISA plan
- Claimant's Constitutional Challenge
 - Equal Protection Rights (14th Amend.) – treats some injured workers differently
 - Access to Courts/Due Process (5th & 7th Amends.)

Constitutional Challenge

- The Commission found there was a “dual and differing system of compensation”
- The Commission engaged in a compare and contrast analysis - comparing the Administrative Workers’ Compensation Act with the Dillard’s Plan created under the Oklahoma Employee Injury Benefit Act, regarding benefits available and the compensability standard for recovery of benefits under each.

Constitutional Challenge

- The Commission concluded that the Oklahoma Employee Injury Benefit Act is a special law, rather than a general law, because it involves only those injured workers employed by employers who “Opted Out” and established a qualifying Benefit Plan.
- The Commission noted there was a general law which applied to all injured workers.

Constitutional Challenge

- The Commission concluded the statute was an unconstitutional special law because it established a separate system for providing work comp benefits to those workers covered by the Benefit Plan, which allowed the employer to define “injury” more narrowly than the legislature so as to limit the employer’s liability, thereby creating an “impermissible, unequal, special treatment of a select group” within “the class of injured workers.”
- *Status: Determined unconstitutional based on a finding of Equal Protection Violation*

Constitutional Challenge

- The Commission addressed the claimant's access to courts challenge and determined the OEIBA creates a monetary barrier to the courts, as well as an absolute barrier based upon the employer's ability to limit liability by defining "injury".
- The OEIBA has an exclusive remedy provision which, together with the employer's discretion to define "injury", creates an impermissible denial of access to the courts.

Oklahoma's Constitutional Challenge

Time Table

- Workers' Compensation Commission Opinion issued February 26, 2016.
- Commission says Opinion is immediately appealable to OK Sup. Ct. which must retain and consider appeal on an expedited basis.
- Dillard's Appeal to OK Sup. Ct.; 3/17/16
- OK Atty Gen. Mot. To Stay; 4/15/16
- HB 2205, Amended Opt Out Legislation— April 2016
- *On appeal, the OK Supreme Court affirmed the violation and the unconstitutional nature of the statute in late 2016*

Tennessee

- House Bill 997
- Senate Bill 721

South Carolina

- House Bill 4197
- Senate Bill 674

Effective Medical Treatment

- Improved access to the most qualified medical professionals, resulting in overall improved medical outcomes
- Improved patient satisfaction, as well as improved recovery
- Quicker referral to appropriate medical care and expedited access to the most qualified and specialized providers

Best Interest of Injured Worker

- Deliver Best Medical Care to Injured Worker
- Maximum Return to Physical Function
- Return to Work
- Income Replacement
- Prevent Medical Abuses
 - Surgery
 - Pain Management & Narcotics
 - Unnecessary & Ineffective Treatment

Best Interest of the Employer

- Return to Work
- Prevent Medical Abuses
 - Unnecessary & Ineffective Treatment
 - Pain Management & Narcotics
- Cost Control
- Fraud Prevention
- Deliver Best Medical Care to Injured Worker
- Maximum Return to Physical Function

Interests of the Medical Providers

- Maximum Return to Physical Function
- Timely Medical Intervention
- Medical Decision Making Ability
- Fees

Interests of the Claimant's Lawyers

- Deliver Best Medical Care to Injured Worker
- Maximum Return to Physical Function
- Income Replacement
- Prevent Medical Abuses
 - Surgery
 - Pain Management & Narcotics
 - Unnecessary & Ineffective Treatment
- Fees
- Return to Work

Interests of the Defense Lawyers

- Maximum Return to Physical Function
- Return to Work
- Deliver Best Medical Care to Injured Worker
- Prevent Medical Abuses
 - Unnecessary & Ineffective Treatment
 - Pain Management & Narcotics
- Cost Control
- Fraud Prevention
- Fees

Other Interests

- State Administrators
- State Work Comp Commissions/Judges
- Other Service Providers & Vendors
- Federal Government – October 20, 2015 letter from group of U.S. Senators to the Secretary of Labor, concluding state work comp systems are no longer adequate and shifting financial burden of injured workers to taxpayers – SSDI, Medicare, Medicaid, food stamps.

Oklahoma

- *Jonnie Yvonne Vasquez v. Dillard's, Inc.*,
OK Commission File No. CM-2014-1106L
- Oklahoma Employee Injury Benefit Act (Opt-Out Act), Oklahoma Statute, Title 85A O.S. Supp. 2015, Sections 201 – 213
- H.B 2205 – Pending Amendments to Current Legislation – April/May, 2016.
- Oklahoma Administrative Workers' Compensation Act
- *Pilkington v. State of Oklahoma, ex rel. Doak*, file No. PR-113662 (April 27, 2015). The Oklahoma Supreme Court decided not to review the constitutional challenge presented in this case.

Questions for Discussion

- What are some of the challenges in the TX workers' comp system?
- Why did Waffle House decide to opt out in TX?
- What has been your experience regarding # of claims, claim costs and litigation since opting out?
- What are some of the key components of your ERISA plan?
- Did Waffle House consider OK?
- Would Waffle House pursue non-subscription in other states if it was available?

Thank you.

Questions?

Contact information



www.sedgwickcms.com

**Chris Mandel, RF, CPRM, CPCU,
ARM-E**

**SVP Strategic Solutions, Sedgwick
& Director, the Sedgwick Institute**

Chris.Mandel@sedgwick.com



www.sedgwickinstitute.com

**“The Ten Building Blocks of Risk Leader Success”
Available for free at www.irmi.com**

**Visit the agenda of the Sedgwick Institute at:
www.Linkedin.com Sedgwick Institute group**

Other References of Interest:

Latest thinking in the industry at: www.Insurancethoughtleadership.com

WC Option Legislation: www.ARAWC.org

Christopher E. Mandel, RF, CPRM, CPCU, ARM-E

Christopher E. Mandel is the SVP for Strategic Solutions at Sedgwick and the Director of the Sedgwick Institute. In both roles he is engaged in helping Sedgwick chart its future through the long term planning for products, services and strategic solutions for this claims and productivity management firm. He is also co-founder and EVP, Professional Services for rPM3 Solutions, LLC as well as founder and president of Excellence in Risk Management, LLC. both independent consulting firms specializing in governance, risk and compliance, with a special emphasis on enterprise risk management. rPM3 Solutions holds a patent for a unique risk measurement process known as ARQ™. Prior to electing early retirement and for ten years from 2001-2010, Mr. Mandel was head of enterprise risk management for USAA Group, a \$165 billion diversified financial services organization. At USAA, he designed, developed and led the enterprise-wide risk management and corporate insurance centers of excellence. He also served as President and Vice Chairman, Enterprise Indemnity CIC, Inc., an Arizona based alternative risk financing facility.

Mr. Mandel has more than 25 years of experience in risk management and insurance in large, global corporates. He has pioneered the development of cross-enterprise risk management capabilities resulting in S&P rating USAA as “excellent and a leader in ERM” from 2006 through 2010. In 2007, Treasury and Risk Magazine bestowed the Alexander Hamilton Award for “Excellence in ERM” on USAA. Mr. Mandel has been a long term senior leader in the Risk and Insurance Management Society including being elected President and Chief Risk Officer and was named Risk Manager of the Year in 2004. He also received RIMS’ Goodell Award (2016) for lifetime achievement.

Mr. Mandel’s deep, wide and diverse experience in all facets of risk management and insurance allows him to offer those interested in managing risk with excellence to engage him to provide everything from a comprehensive strategy and complete ERM framework to targeted guidance, tools, techniques and/or training. Mr. Mandel’s innovative approach to making risk a key strategically placed and results oriented function results from solidly connecting risk management outputs to a company’s key performance metrics and ultimately, mission accomplishment.

Mr. Mandel received his B.S. in Business Management from Virginia Polytechnic Institute and State University and an MBA in finance from George Mason University. He holds the CCSA, CPCU, ARM and AIC designations and is a frequent industry speaker, teacher and writer. He writes the “Risk Innovation” column for Risk and Insurance magazine and *in 2008 was elected a member of Risk Who’s Who (RWW). He also wrote the Ask a Risk Manager column for Business Insurance from 1996 through 2008.*